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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MARK SEIDENBERG, as Executor, etc.,

Cross-complainant and Appellant;

v.

JOHN NEEDHAM et al.,

Cross-defendants and Respondents.

G044941

(Super. Ct. No. 07CC05712)

OPINION

Appeal from a judgment of the Superior Court of Orange County, Geoffrey T. Glass, Judge. Affirmed.

D. Colette Wilson for Cross-complainant and Appellant Mark Seidenberg.

Green & Hall, Robert L. Green and Lawrence J. Luppi for Cross-defendants and Respondents John Needham and Tustin Ave. Trust #500-110 UDT 5/8/03, Needham Family Investments, Inc. as Trustee.

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Cross-complainant Mark Seidenberg<sup>1</sup> (acting as executor of the estate of Sophie H. Seidenberg) appeals the court's judgment of dismissal with regard to two of the seven cross-defendants he sued for slander of title and cancellation of cloud on title, (1) John Needham and (2) Tustin Ave. Trust #500-110 UDT 5/8/03, Needham Family Investments, Inc. as Trustee (Tustin Ave. Trust). We affirm.

## FACTS

Seidenberg's deceased mother held two deeds of trust on a property in Anaheim, California. After a foreclosure sale occurred, various legal disputes ensued because one of the deeds of trust was not paid off as a result of the sale. In November 2006, a trial court entered judgment against Seidenberg in a prior case (*not* this case) brought by Tustin Ave. Trust: (1) declaring "the total unpaid balance of the subject First Deed of Trust . . . to be \$47,801.30 (consisting of principal of \$44,563.82 plus interest in the amount of \$2,950.06 plus late fees in the amount of \$287.42"; (2) ordering Seidenberg to pay a civil penalty to Tustin Ave. Trust in the amount of \$300 pursuant to Civil Code section 2943, for failing to provide a payoff amount to Tustin Ave. Trust upon written demand; and (3) ordering Seidenberg to pay reasonable attorney fees and costs in an amount to be determined by the court. This court affirmed the prior judgment in *Seidenberg v. Reliable Trust Deed Services, Inc.* (Aug. 28, 2008, G037726, G038072) [nonpub. opn.]. In December 2006, the trial court in the prior action awarded \$68,540.50 in attorney fees and \$2,234.50 in costs. This postjudgment order apparently was never appealed.

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<sup>1</sup> This court is already familiar with Seidenberg and the underlying facts of this dispute from prior appeals. (See *Wowor v. Esmaili* (Nov. 30, 2010, G041434) [nonpub. opn.]; *Seidenberg v. Reliable Trust Deed Services, Inc.* (Aug. 28, 2008, G037726, G038072) [nonpub. opn.].)

The instant action was filed by the former owner of the Anaheim property, Trees Wowor. Seidenberg filed his cross-complaint in the instant case in August 2008. The cross-complaint alleges certain parties, including Needham and Tustin Ave. Trust, conveyed the Anaheim property and recorded certain deeds in a manner suggesting Seidenberg no longer held a valid first deed of trust with regard to the Anaheim property.

Needham and Tustin Ave. Trust filed a motion for judgment on the pleadings on the ground that Seidenberg could not establish any pecuniary loss. They argued: (1) the prior action established the payoff amount to extinguish Seidenberg's deed of trust as \$47,801.30; (2) the prior action ordered Seidenberg to pay Tustin Ave. Trust \$71,075 in attorney fees, costs, and statutory penalties; and (3) because these awards offset one another (and then some in favor of Tustin Ave. Trust), Seidenberg no longer was owed any money and his deed of trust was no longer valid as the debt had been repaid to him (not in cash, but as an offset against the money he owed to Tustin Ave. Trust).

The trial court agreed with this argument and granted the motion for judgment on the pleadings. In the judgment, the court made explicit what it deemed implicit in the outcome of the prior action: "the judgment in favor of Tustin Ave. Trust and against Seidenberg [in the prior action] is partially satisfied. The net unpaid judgment in favor of Tustin Ave. Trust and against Seidenberg is now \$24,273.70 plus interest."

## DISCUSSION

Seidenberg's appeal raises a single argument:<sup>2</sup> the prior action in which Tustin Ave. Trust obtained a net recovery against Seidenberg was time barred because it

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<sup>2</sup> Seidenberg made a second argument in his opening brief, but withdrew this argument in his reply brief.

was not filed within one year of Seidenberg's mother's death as required by Code of Civil Procedure section 366.2.<sup>3</sup> Seidenberg concedes in his brief that this argument was not raised in the prior action or at the trial court in this action, and that such a contention ordinarily would be untimely. Seidenberg asserts, however, that an executor of an estate cannot waive or forfeit a statute of limitations defense held by the estate.

Seidenberg cites *Nathanson v. Superior Court* (1974) 12 Cal.3d 355 in support of his argument. *Nathanson* involved the late filing of a creditor's claim in probate court.<sup>4</sup> (*Nathanson*, at pp. 358-360, 364-365.) Our Supreme Court applied "the basic rule . . . that all claims arising upon contract, all claims for funeral expenses and all claims for damages as specified by the Probate Code 'must be filed or presented within the time limited in the notice [of administration] and any claim not so filed or presented is barred forever . . .'" (*Id.* at p. 364.) In doing so, the court noted cases holding "that the statutory requirement that a creditor's claim be presented or filed within the statutory period cannot be waived by the representative of the estate." (*Id.* at p. 365.) *Nathanson* had nothing to do with the statute of limitations specified in Code of Civil Procedure section 366.2 and provides no support to the preposterous notion that Seidenberg could

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<sup>3</sup> "If a person against whom an action may be brought on a liability of the person, whether arising in contract, tort, or otherwise, and whether accrued or not accrued, dies before the expiration of the applicable limitations period, and the cause of action survives, an action may be commenced within one year after the date of death, and the limitations period that would have been applicable does not apply." (Code Civ. Proc., § 366.2, subd. (a).)

<sup>4</sup> Creditors' claims against a decedent's estate must be filed before the later of: "(1) Four months after the date letters are first issued to a general personal representative. [¶] (2) Sixty days after the date notice of administration is mailed or personally delivered to the creditor." (Prob. Code, § 9100, subd. (a).) At the time *Nathanson* was decided, the corresponding timing provisions governing creditor claims against decedent's estates were found in former Probate Code section 700, subdivisions (a) and (c). (Cal. Law Revision Com. com., 53A West's Ann. Prob. Code (1991 ed.) foll. § 9100, p. 398.)

somehow void a judgment made final three years ago by pointing to a statute of limitations he only raised in an appeal of a separate case.

Seidenberg refers in his reply brief to cases in which courts allowed the executor/administrator of an estate to raise tardy statute of limitations defenses on behalf of the estate, even for the first time on appeal. (*Reay v. Heazelton* (1900) 128 Cal. 335, 338-339; *Bryson v. Hill* (1930) 107 Cal.App. 158, 160.) But these cases do not allow a statute of limitations defense to be used to collaterally attack a final civil judgment. We reject Seidenberg's claim without addressing the merits of whether the underlying action was even subject to Code of Civil Procedure section 366.2. (See *Dacey v. Taraday* (2011) 196 Cal.App.4th 962, 980-986 [analyzing applicability of Code of Civ. Proc., § 366.2 to claims arising in part after decedent's death].)

#### DISPOSITION

The judgment is affirmed. Seidenberg's request for judicial notice is denied. Respondents Needham and Tustin Ave. Trust shall recover costs incurred on appeal.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.